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SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1952

No. 407

SIDNEY KROSS,

Petitioner,

vs.

STATE OF CALIFORNIA,

Respondent

PETITION FOR A WRIT OF CERTIORARI TO THE SUPERIOR COURT OF LOS ANGELES COUNTY, STATE OF CALIFORNIA.

To the Honorable the Chief Justice of the United States and the Associate Justices of the Supreme Court of the United States:

Your petitioner, SIDNEY KROSS, respectfully represents the following:

A

Summary Statement of Matter Involved

The petitioner, Sidney Kross, was convicted on July 20, 1951, of the crimes of grand theft, in two counts, and burglary in the second degree, in two counts, after trial before the Hon. Philip H. Richards and a jury in the

Superior Court, Los Angeles County, State of California (Fol., 113-116, 123).

On September 14, 1951, the petitioner, Sidney Kross was sentenced to the State Prison, at San Quentin, California, for the term prescribed by law as to each count upon which he was convicted, all sentences to run concurrently with each other (Fol., 121).

Petitioner Kross was released on bail in the amount of $7500 pending an appeal of the judgment of conviction and the order denying a new trial (Fol., 122).

On August 8, 1952, the District Court of Appeals, Second District, State of California unanimously affirmed, with an opinion (Fol., 986-999) the judgment of conviction and the order denying a new trial.

On September 4, 1952, the Supreme Court of the State of California, by a majority of the Court with two justices dissenting, denied the defendant's petition for a hearing (Fol., 1000).

On September 25, 1952, Mr. Justice Clark of the Supreme Court of the United States granted a stay of execution of sentence, pending a determination of this application.

On October 17, 1952, Mr. Justice Clark by an amendment to his order of September 25, 1952, fixed bail in the amount of $7500 for the petitioner, conditioned upon the bail bond in that amount being approved by the judge of the Superior Court, County of Los Angeles, State of California, and thereafter being posted with the Clerk of that Court.

The bail bond has been approved and posted in accordance with the directions in the order of Mr. Justice Clark and the petitioner is presently at liberty, pending the determination of this petition.

B

The Crime Charged

The information filed in the Superior Court of the County of Los Angeles, State of California by the District Attorney of Los Angeles County, charged the petitioner, Sidney Kross, with grand theft in two counts and burglary in two counts (Fol., 1-5).

C

Question Presented

Whether the rights of a defendant to be accorded due process of law under the provisions of the Fourteenth Amendment of the Constitution have been invaded and violated under the following circumstances:

(a) During the course of the trial, just after the trial justice had hurriedly left the bench for a short recess leaving at least four jurors in the jury box, a group of newspaper photographers and television cameramen rushed to the petitioner at the counsel table (Fol., 739-748); the said photographers and newsmen made a number of highly detrimental and prejudicial remarks to petitioner in trying to induce him to be photographed; their comments, all within the observation and hearing of the said four jurors, were in substance, as follows:

> "Come on, let's take your face and your baggy pants together. What are you hiding your face for? Come on, lift it up and let's take a picture of you. What is the matter with you? The jury will think you are guilty. These pictures of you hiding your face won't do you any good with the jury. Let's see your face" (Fol., 740).

Many other remarks were made and epithets hurled which are too numerous to mention herein; at all times herein

mentioned, the bailiff and the Deputy District Attorney prosecuting the case were present and aware of the event, but did nothing to protect petitioner's rights (Fol., 250, 744, 746); the Deputy District Attorney stipulated that the said four jurors were in the Courtroom when the foregoing occurred (Fol., 743) and the petitioner's affidavit setting forth the comments in issue stood uncontradicted by the said prosecution; in the light of the wholly circumstantial nature of the case presented by the prosecution, as appears from the whole record, petitioner's counsel moved first for a mistrial (Fol., 248) then for a new trial (Fol., 735) both motions being denied by the trial justice (Fol., 252, 735, 749) who had theretofore, in chambers, told defense counsel that he would grant a new trial (Fol., 746).

D

Brief Summary of the Facts

The witnesses for the prosecution testified that on February 15, 1951, at about 11:40 A. M., the defendant entered the establishment of Robert Walsh, a wholesale fur dealer in Los Angeles, wearing a top coat, although the day was quite warm (Fol., 989). The defendant allegedly identified himself by the name of Feinberg and state he was waiting for his wife (Fol., 989). No one saw the defendant actually leave the premises (Fol., 989) and shortly after his exit, upon an inventory being taken in the storage vault, two mink cape stoles and a fur neck piece were found to be missing (Fol., 989). No one ever placed the defendant in the storage vault and the fur pieces in question were never produced.

On the same day at about 12:50 in the afternoon, the defendant, according to the people's witnesses, presented himself at the office of the Giba-Friedman Fur Company in

Los Angeles, and asked if his wife, "Mrs. Lawine" had arrived and upon being informed that she had not, proceeded to wait and acted in a suspicious manner (Fol., 990). The defendant left after a while and the next day when an inventory was taken in the storage room, two mink stoles were allegedly missing (Fol., 990). These two fur pieces were never produced.

The defendant was apprehended the following day after he was seen by Robert Walsh, the owner of the first wholesale fur establishment he allegedly had visited the day before (Fol., 991, 992). None of the fur pieces purportedly missing were found on the defendant, nor were they ever produced in the Courtroom during the trial. The defendant's clothing upon being examined was found to contain numerous hairs (Fol., 992) which upon being mounted and compared to mink and stone marten hairs, were testified to as being similar by the police chemist (Fol., 992, 993).

The defendant himself did not testify but produced a fur expert of many years' experience who was critical of the police chemist's mounting of the hairs by reason of which he could not make comparisons (Fol., 993).

The conviction of the defendant was thus obtained by means of weak circumstantial evidence. The proposition therefore, as to whether the Trial Court erred in failing to grant the motion for a mistrial, or order a new trial by reason of the misconduct of the newspaper and television photographers, toward the petitioner in the presence of at least four jurors becomes that much more important.

As was stated in *Lyons* v. *State of Oklahoma,* 322 U. S. 596, 601-2:

> "The federal question presented is whether the failure to grant a mistrial or new trial constituted a violation of the due process clause of the Fourteenth Amendment which requires that state criminal proceedings

'shall be consistent with the fundamental principles of liberty and justice.' "

Herbert v. *Louisiana*, 272 U. S. 312;
Mooney v. *Holohan*, 294 U. S. 103;
Buchalter v. *New York*, 319 U. S. 427.

E

Circumstances under Which A Fair Trial Was Denied to the Petitioner

The undisputed facts prove that the prejudicial misconduct and comments to the defendant in the Courtroom, took place in the presence of at least four jurors. This violation of the due process clause of the Fourteenth Amendment to the Federal Constitution was urged at the trial and upon appeal by the petitioner.

The Brief attached hereto will disclose more particularly why the petitioner was deprived of the constitutional guarantee of a fair and impartial trial.

F

Grounds upon Which the Jurisdiction of the Court Is Invoked

We respectfully submit that this Court has jurisdiction to entertain this petition for a writ of certiorari by virtue of Section 1257 of Title 28 U. S. Code, and Rule 38 of the Rules of The Supreme Court of the United States.

At the trial and on his unsuccessful appeal to the District Court of Appeals, Second District, State of California, the petitioner, invoking the protection of the Fourteenth Amendment of the United States Constitution, sought a new trial and reversal of the judgment of conviction, by reason of the denial of due process of law during the course of his trial. The same ground was urged on a petition for a rehearing

before the same District Court of Appeals, Second District, State of California and for a hearing before the Supreme Court of the State of California, which was denied, with two justices of the latter tribunal dissenting and voting to grant a hearing.

G

Reasons Relied upon for the Allowance of the Writ

The Superior Court of Los Angeles County, State of California, the District Court of Appeals, Second District, State of California, have all in effect decided a federal question of substance in a way "probably not in accord with applicable decisions of this Court" (Rule 38 of the Rules of the Supreme Court), in holding that the rights of petitioner Kross under the Fourteenth Amendment of the Constitution of the United States had not been violated or denied, by reason of the failure to grant a mistrial, order a new trial and reverse the judgment of conviction, predicated on the uncontroverted prejudicial conduct and statements against the petitioner by certain persons in the presence of jurors during the course of the trial.

See:

Lyons v. *Oklahoma*, 322 U. S. 596;
Stroble v. *California*, 343 U. S. 181;
Herbert v. *Louisiana*, 272 U. S. 312;
Mooney v. *Holohan*, 294 U. S. 103;
Buchalter v. *New York*, 319 U. S. 427.

Although this Court has enunciated and often reiterated the rule that the constitutional guaranty of "due process of law" in the Fourteenth Amendment forbids a State from depriving a defendant in a criminal proceeding of the essential rights of a fair trial unimpaired by any outside inter-

ference, such well established rule of law was ignored or overlooked in the instant situation.

The very situation as confronted the petitioner and the possible danger to the essential rights of the accused was undeniably responsible for the enactment of Rule 53 of Federal Rules of Criminal Procedure which reads:

> "*Rule 53 Regulation of Conduct in the Court Room*— The taking of photographs in the Court room during the progress of judicial proceedings or radio broadcasting of judicial proceedings from the Court room shall not be permitted by the Court."

To the same effect see:

> McKinney's Consolidated Laws of New York, Civil Rights Law, Section 52.

Surely it is in contravention of "due process of law" that a defendant, who is reluctant to have his photograph taken, in the very Courtroom in which he is being tried in accordance with the American concept of justice, is cajoled and actually prejudiced by strangers to the trial, all within the presence of some of the jurors who are passing upon his innocence or guilt.

Any defendant under similar circumstances is helpless and unless the Court takes some affirmative action in protecting his essential rights, he is utterly without recourse. In the instant matter the Court could have and should have protected the rights of the accused by granting a mistrial or new trial in order to insure the defendant of a fair trial, without any doubt of prejudice against him as a result of the occurrence in the Courtroom.

Is there not good and sufficient reason for allowing the writ of certiorari in the case at bar, if only to permit the defendant to have a new trial, so that his innocence or guilt can be determined solely on the evidence, without any pos-

sible prejudice being brought to bear against him by complete strangers to the proceeding?

Appended hereto is a brief in support of this petition.

WHEREFORE, your petitioner, Sidney Kross, prays that a writ of certiorari may issue out of and under the seal of this Court to the Superior Court of Los Angeles County, State of California, commanding the said Court to certify and send to this Court for review and determination as provided by law, this cause and a complete transcript of the Record and all proceedings had herein, as heretofore remitted to the said Superior Court of Los Angeles County, by the District Court of Appeals, Second District, State of California, and that the order of the District Court of Appeals, Second District, State of California, affirming the judgment and order denying a new trial in this cause may be reversed, and that petitioner may have such other relief as this Court may deem appropriate.

Dated: October 22, 1952.

SIDNEY KROSS,
Petitioner;

By: IRVING I. ERDHEIM,
Counsel for Petitioner.

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1952

No. 407

SIDNEY KROSS,

Petitioner,

against

STATE OF CALIFORNIA,

Respondent

BRIEF IN SUPPORT OF PETITION FOR A WRIT OF CERTIORARI

Opinion Below

The Supreme Court of the State of California denied, without opinion, two justices dissenting, a petition for hearing the appeal from the District Court of Appeal of the State of California, Second Appellate District, which court had affirmed a judgment of conviction imposed upon petitioner and an order denying petitioner new trial.

Jurisdiction

The statement under which the jurisdiction of this Court is invoked, as well as the statement of the question presented, and the factual matter relevant to this application, appear in the petition to which this brief is annexed.

ARGUMENT

The petitioner urges that he has been convicted of the crimes of grand theft and burglary in the second degree and sentenced to the state penitentiary, as the result of a trial in which the trial justice refused to grant a motion for a new trial, or, in the alternative a mistrial, based upon the conduct and prejudicial comments of certain press photographers and reporters in attempting to photograph the petitioner in the courtroom against his will and in the presence of at least four jurors who remained in the jury box after the court had recessed, all of which worked a denial of a fair trial to the petitioner as guaranteed by the due process clause of the Fourteenth Amendment to the Constitution of the United States.

Point I

The Refusal to Grant a New Trial or Mistrial in View of the Highly Prejudicial Conduct and Statements of Photographers and Newsmen Towards the Petitioner in the Presence of at Least Four Members of the Jury Was a Violation of the Rights of the Petitioner Under the Due Process Clause of the Fourteenth Amendment to the Constitution of the United States.

The question here presented is whether the conduct of strangers to the trial was so prejudicial to the rights of the petitioner as to be tantamount to a denial of a fair trial guaranteed by the due process clause of the Fourteenth Amendment to the Constitution of the United States.

On the second day of the trial, shortly after court was convened on that date, the trial justice hurriedly announced a short recess and retired to his chambers at which time at least four jurors remained in the jury box (Fol., 739-748).

Immediately thereafter, a group of newspaper photog-

raphers and television camera men rushed up to the counsel table and well within the visible and audible range of the remaining jurors, the bailiff and the prosecutor, took pictures of petitioner despite his strenuous protests and tried to force him to expose his face to their lenses (Fol., 740). In addition thereto, the said persons plagued the petitioner to favor their papers with a photograph of him wearing his oversized pants which the prosecution had characterized as the depository in which the petitioner allegedly had concealed the fruits of his larcenous endeavors. In the course of this invasion of petitioner's right of privacy, a great deal of conversation was indulged in by the gentlemen of the fourth estate, making sundry comments and remarks in full view and hearing of the said jurors. Among the comments made during this time was in substance, the following:

> "Come on let's take your face and your baggy pants together, what are you hiding your face for. Come on lift it up and let's take a picture of you. What's the matter with you. The jury will think you are guilty. These pictures of you hiding your face won't do you any good with the jury. Let's see your face" (Fol., 740).

Also, during this time, other jurors were approaching the jury box. Many other remarks were made and epithets hurled which are too numerous to mention.

The foregoing was uncontradicted by the prosecutor who even stipulated the four jurors were in the courtroom and that he was present. Petitioner's trial counsel immediately reported the aforesaid incident to the trial justice in his chambers, the latter stating, at the time, that he had heard the noise and confusion in his chambers and that he would recess the court until 2:00 P. M., at which time he would grant a mistrial, and, in the interim, counsel could confer

with his client and the court would peruse the authorities with regard to the subject of double jeopa rdy (Fol., 746). None of the foregoing facts have been co ntroverted. At the end of the said recess, counsel for petiti ioner duly made a motion for a mistrial based upon the pre judicial conduct of the photographers and newsmen in the p presence of several members of the jury (Fol., 248). Contr ary to his statement made in chambers in the presence of p petitioner's trial counsel, the trial judge denied petitioner's m motion, although he did admonish the jury against consider ing any part of the said unfortunate incident in deciding the issues to be presented to them (Fol., 252).

Thereafter, the petitioner made a motion for a new trial before the trial judge who denied this mo tion also, stating that:

> "It was an untoward and unfortuna ate event, but it is one which might have well been repe ated in the hallway, on the street, in the presence of one or more jurors, and the Court will have to assume tha t the jurors not only followed the admonition of the Co urt to disregard the event entirely but followed their o ath in returning a verdict based on the evidence intro oduced in Court and not that which they saw in new spapers, saw in the hallways or saw in the courtroom when the Court was not in session" (Fol., 749).

At the very outset, this Honorable Co urt must bear in mind that the incident referred to trans pired while the Court, though recessed, had been opened to transact the business of the day.

The court again recessed upon its retu rn to the bench after it had been informed of the occurr ence in question. Since the Court was still technically in se ssion, its duty of presiding over the trial and the particip ants therein and the conduct of all persons in attendance, had in no way terminated. The bailiff in attendance, w hen the acts and

conduct in question occurred, was under the direction of the presiding justice and the fact that the bailiff apparently let things get out of hand, as uncontrovertably established, should certainly not militate against the petitioner who did not have such control over the situation as the said servant of the court could have exercised with due diligence.

It is the duty of each and every presiding officer in every jurisdiction where justice and freedom are still cherished to conduct, or cause to be conducted, its courtroom in such a manner as to render inviolate, without leaving room for doubt, the fundamental rights and liberties of each and every individual who stands before it.

It is most reasonably conceived that there devolves upon a trial justice during the course of a trial a duty to supervise the withdrawal and entrance of all jurors before he leaves the bench lest they be exposed to influences and prejudices diametrically opposed to the fundamental rights of the parties and their constitutional guarantee.

The judge conducting a jury trial is not a mere moderator but is the governor of the trial for the purpose of assuring its proper conduct and he has the responsibility of striving for an atmosphere of perfect impartiality.

See:

Glasser v. *U. S.*, 315 U. S. 60;
Kretske v. *U. S.*, 313 U. S. 551;
Roth v. *U. S.*, 313 U. S. 551.

As was stated in *Glasser* v. *U. S.*, 315 U. S. 60, 71:

> "Upon the trial judge rests the duty of seeing that the trial is conducted with solicitude for the essential rights of the accused."

A strict adherence to the above stated concepts of justice would have rendered nugatory just such a possibility as in this instance developed into actual fact.

No instruction, however pointed, could have cured the prejudicial impressions dramatically conveyed to the jurors. The fact that the trial justice was in chambers at the critical moment did not relieve him of the responsibility assumed by him in undertaking his sacred duty. To the extent that the court was convened for the business of the day, and four jurors were left in the box when the court retired, and that the court's attache, the bailiff, was present but failed to protect petitioner's rights, it must be said that the trial judge participated in the event.

In the light of the highly circumstantial nature of all of the evidence presented, from which only indirect references of guilt or the lack of it could reasonably be drawn, the event in question was sufficiently prejudicial to tip the scales of doubt in favor of the prosecution's case.

Cognizance must be taken of the make-up of the jury. A panel is comprised of persons of all walks of life, of varying foibles, sensitivities and resistancies to impressions and opinions of others. How far did the event in question go towards beating down the jury's resistance to adverse influences which might hinder their sworn duty to render a fair, impartial verdict? The average man has always been influenced by the press and public information services and necessarily the men who provide the news for public consumption are reasonably placed upon a higher plane of intelligence and respect than the average. Therefore, how much more relatively impressed is the average man when opinions, remarks and comments are made within his sight and hearing by these members of the press who are widely reputed to be well informed. This incident had an even more far reaching effect. No less a personage than the trial justice himself immediately upon being informed of the happening, indicated the high degree of prejudice which had been inflicted upon the petitioner when he stated in cham-

bers that he thought that the reported incident was prejudicial to the petitioner and that he would grant a mistrial. The opinion of the trial justice with respect thereto was even more sharply emphasized when he stated that he wished to make inquiry into the authorities on the question of double jeopardy.

Therefore, the facts herein related raise a question of law both fundamental and far reaching.

The question presented for this Court's determination was set forth at the very outset of Point I.

This Court has heretofore stated that:

> "As applied to a criminal trial, denial of due process is the failure to observe that fundamental fairness essential to the very concept of justice."
>
> *Lisenba* v. *California*, 314 U. S. 219, 237.

It is respectfully submitted that, in view of the facts, "that fundamental fairness" was here denied to the petitioner when his motion for a mistrial, and later for a new trial, was denied.

In an earlier case, this Court made specific reference to a circumstance and the law applicable thereto, closely akin to the case at bar. The Court there stated:

> "Private communications, possibly prejudicial, between jurors and third persons, or witnesses, or the officer in charge are absolutely forbidden, and invalidate the verdict, at least unless their harmlessness is made to appear."
>
> *Mattox* v. *U. S.*, 126 U. S. 140, 150.

It is respectfully submitted that the law above quoted is applicable hereto. The "harmlessness" of the events in issue were never shown here; but, to the contrary, the trial justice himself indicated in chambers that resulting prejudice was possible by stating that he would look into the

authorities on the question of double jeopardy and that he would grant a mistrial.

If remarks are made within the hearing of jurors by strangers to the litigation, which remarks might probably influence the verdict, a new trial should be granted.

66 Corpus Juris Secundum, Section 51, P. 165.

The Federal District Court for the Eastern District of Pennsylvania has stated that:

> "It is an attack upon the prisoner's constitutional rights to influence the jurors by presenting to their minds charges against him of which no evidence has been offered, or by urging upon the jurors, or suggesting to them, that the defendant is guilty and ought to be convicted."
>
> *U. S.* v. *Ogden*, 105 Fed. 371.

It is respectfully submitted that what transpired on the day in question was of sufficient suggestive force as to give rise, in the minds of the jurors present, the possibility or probability of petitioner's guilt. This possibility or probability is enhanced by the fact that where a purely circumstantial case is presented to the jury, as in the case at bar the juror's doubt, which is a normal reaction in that type of case, may well be influenced and resolved by just such circumstances as were presented during the trial of this case

Conclusion

The probability of prejudice permeating the deliberations of the jurors was clear, present and imminent to such a degree that a refusal to grant either a mistrial or new trial effected a denial to the petitioner of a fair and impartial trial within the concept of the due process clause of the Fourteenth Amendment to the Constitution of the United States.

For all of the foregoing reasons, and in consonance with the decisions rendered by this Court, a writ of certiorari should be granted.

Respectfully submitted,

IRVING I. ERDHEIM,
Counsel for Petitioner.

ROBERT F. ARMSTRONG,
EDWARD M. CHAPIAN,
Of Counsel.

APPENDIX A

UNITED STATES CONSTITUTION, AMENDMENT XIV, SECTION 1

"nor shall any State deprive any person of life, liberty, or property without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws."

APPENDIX B

Title 28, Sec. 1257, U. S. Code

"Final judgments or decrees rendered by the highest court of a State in which a decision could be had, may be reviewed by the Supreme Court as follows:

"(3) By writ of certiorari where any right, privilege or immunity is specially set up or claimed under the Constitution of the United States."

APPENDIX C

FEDERAL RULES OF CRIMINAL PROCEDURE: RULE 53. REGULATIONS OF CONDUCT IN THE COURT ROOM

"The taking of photographs in the Court room during the progress of judicial proceedings or radio broadcasting of judicial proceedings from the Court room shall not be permitted by the Court."

APPENDIX D

McKINNEY'S CONSOLIDATED LAWS OF NEW YORK, CIVIL RIGHTS LAW, SECTION 52

"No person, firm, association or corporation shall televise, broadcast, take motion pictures or arrange for the tele-

vising, broadcasting, or taking of motion pictures within this state of proceedings, in which the testimony of witnesses by subpoena or other compulsory process is or may be taken, conducted by a court, commission, committee, administrative agency or other tribunal in this state.

"Any violation of this section shall be a misdemeanor."

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I.

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IN THE

Supreme Court of the United States

October Term, 1952.
No. 407.

SIDNEY KROSS,

Petitioner,

vs.

THE STATE OF CALIFORNIA,

Respondent.

RESPONDENT'S BRIEF IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI.

Petitioner seeks review by this Honorable Court of the Decision of the District Court of Appeal, Division Two, of the State of California affirming his conviction of these crimes: Two counts of grant theft; two counts of burglary in the second degree, for which he was sentenced to the State prison for the terms prescribed by law, Counts 1 and 3 to run concurrently but consecutive to Counts 2 and 4 which were ordered to run concurrently. (*People v. Kross,* 112 A. C. A. 701.) A hearing was denied by the California Supreme Court on September 6, 1952. [R. p. 87.]

Jurisdictional Question.

Petitioner asserts that he was denied due process of law on the following ground:

That where newspaper photographers contact a defendant in a criminal case during a court recess to take his picture and where the defendant refuses to pose but hides his face in an effort to escape being photographed, four jurors having returned to the jury box, such occurrence results in a deprivation of a fair trial and due process, even though neither the trial judge nor the prosecutor were responsible for the actions of the photographers, and the jury were immediately instructed to disregard any such activity.

Statement of the Case.

In an information filed by the District Attorney of Los Angeles County, petitioner was charged with two counts of grand theft and two counts of burglary. Petitioner entered a plea of not guilty as charged. In a trial before a jury, petitioner was found guilty as charged, the jury finding that the burglaries were of the second degree. Motion for new trial was denied; application for probation was denied; and petitioner was sentenced to the State prison for the term prescribed by law, the sentences under Counts 1 and 3 to run concurrently but consecutive to Counts 2 and 4 which were ordered to run concurrently. [R. pp. 50-51.]

Statement of the Facts.

The facts demonstrating petitioner's guilt of the crimes charged, as found by the California District Court of Appeal, are set out in the Transcript of Record at pages 75 through 80. As revealed by the District Court's opinion, this case involves appellant's entry of two fur stores in Los Angeles with the intent to steal valuable furs and his success in perpetrating the thefts. Petitioner's guilt was proved by evidence of percipient witnesses who placed him at the scenes of the crimes and who established the *corpus delicti* of each theft. Other facts were presented connecting petitioner with the crimes: flight upon being recognized by his victims; failing to halt his flight even though commanded to stop by a police officer; false reasons for his presence at the fur salons; the use of false names at the salons and when arrested; attempted bribe of a police officer; the giving of a false story as to the time of his arrival in Los Angeles from Chicago and as to his place of residence in this city; evidence of a common scheme in obtaining access to the fur salon; evidence of a *modus operandi* in secreting fur garments in his loose fitting clothing; the discovery of hairs from furs, such as those stolen, adhering to the inside of his trousers and on his socks.

The evidence produced by the prosecution was uncontroverted, and appellant failed to take the stand in his own behalf.

ARGUMENT.

I.

Petitioner Was Not Denied a Fair Trial or Due Process of Law by Reason of the Fact That Photographers Took His Picture During a Court Recess Where Neither the Court nor the Prosecutor Were Responsible Therefor.

In considering the question raised by the petitioner herein, it should be pointed out that two motions were made based upon the actions of the photographers. The first was a motion for a mistrial [R. p. 5]; the second was a motion for a new trial after the verdicts of guilty were entered. [R. pp. 49-50.] In the petition for writ of certiorari, the facts presented to the trial court at the time of the motion for mistrial have been merged without distinction with allegations contained in petitioner's affidavit filed in support of the motion for new trial. At the motion for mistrial petitioner's trial counsel presented these facts for the court's consideration:

At the morning recess, photographers endeavored to obtain petitioner's picture while he was seated at the counsel table. Petitioner had his head down with a handkerchief over his eyes. The court was not in session at the time, and the trial judge was in his chambers. One of the photographers had a motion picture camera. Trial counsel for petitioner took the position that the court had ordered the bailiff to clear the courtroom of the reporters and to summon the jurors. Apparently, then, the four jurors seen in the box had entered during the close of the regular morning recess period. [R. pp. 54-55.]

The comment of the trial judge concerning the occurrence was:

> ". . . It might have arisen in the hallway. Pictures and photographers exercising whatever rights they deem they have made even against the wishes and desires of the defendant; they might have attempted to take his picture in the hallway, and the jurors pass to and fro, and that is a situation over which the Court has absolutely no control. Those pictures might or might not have reached the public eye through the medium of the press. I think the defendant and the prosecution both have a right to assume that the jurors were going to follow their oath, that they will not decide this case on anything except the evidence introduced before them in this case, which means the evidence while the Court is in session." [R. pp. 55-56.]

Upon resuming the bench, the trial judge admonished the jury as follows:

> "Ladies and gentlemen, during the morning recess certain events occurred, some of which may have been seen by some of you. At an appropriate time you will be instructed, as you have already been advised in your examination, that the guilt or the innocence of any defendant and this defendant in particular is to be decided only from the evidence adduced during the trial of the case and from no other source whatsoever. I, therefore, admonish you that whatever any of you may have seen this morning is not evidence in this case; it is not to be considered by you in any way, shape or nature in deciding the issues which will be ultimately presented to . . ." [R. p. 56.]

At the time of the motion for a new trial it was stipulated that if petitioner's trial counsel testified he would testify to the same facts and, additionally, that counsel was trying to act as a screen between the cameras and his client; that the first time he saw any jurors was when he turned and saw four of them in the box, and others were preparing to file in. Again it appears that the jurors began to enter the courtroom near the end of the recess period. Petitioner's counsel and the deputy district attorney both immediately went into chambers and informed the judge of the situation [R. p. 65], and the judge forthwith ordered the jurors returned to the jury-room. [R. pp. 65-66.]

The only reference to any comments made by the photographers is contained in an affidavit executed by the petitioner to support his motion for a new trial.

In view of the record, we take issue with the assertions of fact found on pages 3 and 12 of the petition. The trial judge did not "hurriedly" leave the bench. He called a morning recess, and the inference seems clear that he did not leave any jurors in the box. The four jurors seen in the box had just filed in near the close of the recess period. At the time of the motion for mistrial there was no evidence that the photographers made any comment which these four jurors could have heard. The trial judge, in ruling on the motion for new trial, was not bound to accept the allegations made in the petitioner's affidavit that such remarks were made. Indeed, at the time of the latter motion trial counsel who was near petitioner at the time in question again was silent as to any such purported remarks.

On pages 3, 5 and 13 of the petition it is stated that there were television cameramen present. We wish to

make it clear that there is nothing in the record about any television cameras or equipment except the averments in the aforesaid affidavit. There is evidence that one photographer had a motion picture camera, but no evidence that the matter was being televised. [R. p. 62.]

It is respondent's position that no Federal question is raised by the foregoing facts and that the writ should be denied. Where guilt is overwhelmingly established, as it was in this case, the burden is upon the petitioner to demonstrate clearly the deprivation of due process by State action. What was the State action in this case? Petitioner asserts that the persistency of the press representatives, srangers to the litigation, became State action because the trial judge spent the recess in his chambers. The affirmative action of the trial judge upon learning of the occurrence was to order the jurors returned to the juryroom immediately. Another assertion is that because the bailiff allowed the jurors to begin filing into the courtroom before the photographers were removed, there was wilful disregard for the petitioner's rights. The record does not support this assertion. The inferences which arise from the record are that four jurors may have seen the situation at a time near the end of the recess period when the jury was being brought in from the juryroom; that immediately the judge became apprised of the situation and ordered them withdrawn. Upon reconvening the court, he admonished the jury to disregard anything which took place during the recess and told them that they were to be guided solely by the evidence adduced during the trial. The action and desire of the duly constituted authorities of this State, therefore, were directed not to the deprivation of any of the petitioner's rights but to the safeguarding of those rights.

A state may regulate the procedure of its courts.

Beazell v. Ohio, 269 U. S. 167, 170, 46 S. Ct. 68, 69;

Ocampo v. United States, 234 U. S. 99, 34 S. Ct. 712, 715;

Mallett v. North Carolina, 181 U. S. 589, 21 S. Ct. 730, 733-734.

The question of whether there has been any prejudicial irregularity is addressed first to the trial court and thence to the state appellate courts. Article VI, Section 4½ of the California Constitution directs the appellate courts of this State to determine whether any alleged error has resulted in a miscarriage of justice. On two occasions the attention of the trial court in this case was called to the occurrence here complained of, and that court determined that the ends of justice were served by an admonition to the jury to disregard any extraneous matter. Next the California District Court of Appeal reviewed petitioner's contention and the record, and its discussion of the matter is found on pages 82-83 of the Transcript of Record. Based upon prior decisions and the general rule stated in 66 Corpus Juris Secundum, section 51, page 165, the District Court made the following finding:

> "While the conduct of the photographers was an unfortunate occurrence there is no showing of prejudice which cannot be assumed where neither the trial court nor the prosecutor was involved, and where the court admonished the jury to disregard the occurrence, calling the jury's attention to their duty to consider only the evidence admitted in the case. The trial court had an opportunity to consider the likely effect of this occurrence upon the jury and the likelihood of prejudice resulting to the defendant. His rulings on both occasions are to the effect that no

prejudice was shown. These determinations by the trial court are determinative on appeal in the absence of a clear abuse of discretion. We find no such abuse." [R. p. 83.]

The California Supreme Court denied a hearing. [R. p. 87.]

In view of the findings of the trial court and the appellate courts of California, no Federal question is presented.

Stroble v. California, 343 U. S. 181, 72 S. Ct. 599, 604.

Conclusion.

Respondent asserts that a review of this record reveals that petitioner was afforded every right to which he was entitled, and that it cannot be said that he was in any way prejudiced by the brief occurrence brought about by strangers to the litigation during a recess in the proceedings. Since there was no State action tending to deprive petitioner of a fair trial and since his guilt was established by overwhelming evidence, respondent urges that no provision of the United States Constitution has been violated, and no Federal question is presented. For the foregoing reasons, respondent submits that the petition for writ of certiorari should be denied.

Respectfully submitted,

EDMUND G. BROWN,
Attorney General,
FRANK W. RICHARDS,
Assistant Attorney General,
STANFORD D. HERLICK,
Deputy Attorney General,
Attorneys for Respondent.

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IN THE

Supreme Court of the United States

OCTOBER TERM, 1952

No. 407

SIDNEY KROSS,

Petitioner,

vs.

THE STATE OF CALIFORNIA,

Respondent.

PETITIONER'S REPLY BRIEF

IRVING I. ERDHEIM,
Counsel for Petitioner.

ROBERT F. ARMSTRONG,
EDWARD M. CHAPIAN,
(on the Brief).

WERBLIN PRESS, N. Y. C.—BEekman 3-1174

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Respondent.

PETITIONER'S REPLY BRIEF

Preliminary Statement

Your petitioner, Sidney Kross, respectfully submits this brief in reply to respondent's brief opposing the petition for a writ of certiorari to the Superior Court of Los Angeles County, State of California.

POINT I

With respect to facts set forth in respondent's brief.

A close scrutiny of the facts as disclosed by the record does not substantiate the strong and overwhelming inference of guilt of the petitioner which respondent seeks to convey to this Court.

Such an unwarranted inference is clearly refuted when it is considered that:

(a) The record is completely devoid of any testimony showing that petitioner was seen in possession of or physically removing from, any of the subject premises, any or all of the fur pieces in question.

(b) No testimony was adduced to show that petitioner was in actual physical reach of the said fur pieces.

(c) None of the fur pieces in question were ever produced upon the trial.

(d) The petitioner was not the only person present in each of the premises, there being employees of each firm and other customers present at all of the times mentioned.

Although the evidence produced by the prosecution remained uncontroverted, its strictly circumstantial character remained unaltered.

On page 4 of respondent's brief, it is stated that "the Court was not in session" when the event prejudicial to the petitioner occurred. The fact is that the Court was in session but the Trial Justice had announced a short recess at the time in question (fols. 739-748).

On page 6 of respondent's brief, it is there stated that the four jurors who were present at the time the incident in question transpired had just filed in near the close of the recess period. Respondent makes no reference to the record to substantiate the said statement. The uncontroverted fact is that there were four jurors in the box and others filing towards the box at the said time (fols. 739, 745).

Although the Trial Justice was not bound to accept the allegations contained in petitioner's affidavit which appears in folios 739-741, the fact is that they remained uncontroverted and were substantiated on the record by petitioner's trial counsel (fols. 743-747), in addition thereto, respondent's trial counsel, Mr. Rose, agreed and stipulated on the record that such substantiation was a true account of the incident in question (fols. 743, 747). There can be no question, therefore, that the allegations contained in petitioner's affidavit, and later in his petition, were a fair and true account of the unfortunate event and that respondent was not warranted in taking issue with the facts alleged in petitioner's brief.

POINT II

With respect to respondent's legal argument.

By no stretch of the imagination could it possibly be said that petitioner's guilt was "overwhelmingly established". The highly circumstantial nature of the evidence presented by the prosecution belies such conjecture.

Petitioner's brief amply illustrates the manner in which he was deprived of due process of law by State action, or inaction, which is the more appropriate term applicable herein. As had been heretofore stated in petitioner's brief, respondent's failure to adequately protect the rights and privacy of petitioner, to shield the jury from prejudicial influences, and the refusal to grant a mistrial after the Court had been apprised of the circumstances, constituted a denial of due process in view of the purely circumstantial case presented against petitioner.

Unfortunately, the action of the California tribunal and its desire to safeguard petitioner's rights, did not

coincide. The duly constituted judicial a[uthorities of the] respondent State have, as a matter of [record, shown a] difference of opinion with respect to th[e deprivation of] due process of law suffered by the petitio[ner. In the first] instance, that the Trial Justice himself w[as gravely con]cerned with the incident, is indicated on [the record when] petitioner's trial counsel reminds the Tri[al Judge as fol]lows:

> ". . . And at that time the Co[urt informed me] that the Court also thought that i[t was somewhat] prejudicial and that the Court was [willing to grant] a new trial but the Court was worrie[d about jeopardy] attaching; at which time, I informe[d the Court that] I doubted very much whether jeo[pardy attached.] And the Court also asked me if I wo[uld waive jeop]ardy . . ." (fol. 746).

At this point, petitioner's counsel, Mr[. Brand, asked] Mr. Rose, the prosecutor:

> "Is that substantially what occu[rred, Mr. Rose?] Mr. Rose: That is substantially [what occurred,] if your Honor pleases" (fol. 747).

Thus the Trial Court's original dispos[ition to grant a] new trial or mistrial stands uncontroverte[d.]

At the risk of repetition, it should also [be emphasized] that when the Supreme Court of California [denied the peti]tion for a hearing, two of the Justices [of said tribunal] dissented from the majority determination [indicating that] there existed some question of deprivation [of due process] in the minds of at least some of the membe[rs of the bench] of California's tribunal of last resort.

The inference made by respondent in i[ts brief that the] decisions of the California Courts indicat[ed that no Fed]eral question is here presented is prematur[e and presump]tious. The final determination of that que[stion rests with] this Honorable Tribunal.

CONCLUSION

In view of the weak circumstantial evidence presented by respondent and, in connection therewith, failure to adequately protect the rights of petitioner with a consequent refusal to grant a mistrial or new trial, constituted a denial of due process to the petitioner in violation of the Fourteenth Amendment to the Constitution of the United States. For all of the reasons herein and heretofore presented, the petitioner respectfully submits that his petition for a writ of certiorari should be granted.

Respectfully submitted,

IRVING I. ERDHEIM,
Counsel for Petitioner.

ROBERT F. ARMSTRONG,
EDWARD M. CHAPIAN,
(on the Brief).

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PETITION FOR REHEARING

Preliminary Statement

On December 22, 1952, this Court, by its order dated on that day, denied the petition herein for a writ of certiorari to the Superior Court of Los Angeles County, State of California.

Pursuant to Rule 33 of the Rules of this Court, the petitioner now applies for a re-hearing of his petition for a writ of certiorari based on other substantial grounds available to petitioner, although not previously presented.

POINT I

The refusal of the Trial Court to allow petitioner's expert, prior to trial, to fully examine the prosecution's exhibits consisting of fur hair contained in vials, impeded petitioner's preparation for trial and deprived him of a right guaranteed by the Fourteenth Amendment to the Constitution of the United States.

The fur pieces which petitioner was convicted of having stolen were never produced and the only evidence presented by the prosecution to directly connect petitioner with the missing fur pieces were some fur hairs, allegedly taken from the trousers of the petitioner at the time of his apprehension. These fur hairs were placed in glass vials and were the basis of testimony by a police chemist and a complaining witness who in substance stated that they closely resembled mink hair (fol. 992).

The prosecution was unable to produce anyone who saw petitioner take the furs in question and they were not found in the possession of the petitioner (fol. 993). There was no evidence that the fur hairs on petitioner's trousers were from the missing fur pieces in the establishments petitioner allegedly burglarized.

Petitioner's trial attorney specifically requested the permission of the Trial Court to allow a competent expert to remove the fur hairs from the glass vials in which they had been placed and to mount them for the purpose of examination as had been done by the prosecution's expert. The Trial Court granted limited permission to petitioner's expert to examine the contents of the vials microscopically and to inspect the prosecution's slides, but refused to allow petitioner's expert to mount the hairs contained in the vials, such as was done by the prosecution (fol. 326).

Petitioner now makes the point that since permission was given to his expert to examine the hair contained in the vials the Trial Court should not have limited him, because by so doing the petitioner was not given a fair and reasonable opportunity to prepare his defense with regard to the most important tangible evidence in the case upon which petitioner was convicted. The prosecution would not have been compelled to disclose its case by the Trial Court permitting a thorough examination of the evidence in question, because as was previously stated, the Trial Court in effect acceded to the request for an examination of the evidence, but limited the extent of the said examination and thus hampered the preparation of petitioner's defense.

From the foregoing it is readily apparent that the prosecution's expert who testified at the trial as to the identity of the hairs in question, had a distinct advantage in being able to mount the hairs on slides, a right which was denied to petitioner's expert. It is now contended that by limiting this right to the petitioner, he was thus deprived of a right guaranteed by the Fourteenth Amendment to the United States Constitution, that is, denial of due process of law.

Under Federal practice a Rule of Court requires the prosecution to permit the examination of all physical evidence prior to trial. Federal Rules of Criminal Procedure, Rule 16.

This Rule is based upon the necessity of giving a defendant in a criminal case a reasonable opportunity to adequately prepare his defense. The Courts have lately demonstrated a more liberal attitude in allowing defendants the right to examine evidence which will be presented by the prosecution in criminal actions. This is only fair and equitable under our system of justice.

The original basis for the petition for a writ of certiorari to the Superior Court of Los Angeles County, State of California, was predicated upon the fact that petitioner was denied a fair trial as guaranteed by the Fourteenth Amendment to the Constitution of the United States by reason of the Trial Court's error in failing to grant a mistrial and in failing to grant a motion for a new trial where cameramen, photographers and reporters barged into the courtroom and made highly prejudicial comments to the petitioner herein in the presence and hearing of at least four jurors trying the case.

The Trial Judge at first indicated that he would grant a motion for a new trial and stated that the incident was regrettable. However, he apparently changed his mind and denied the motion for a new trial. The fact that there was a lingering doubt in the mind of the Trial Justice and the doubt expressed by two of the dissenting Justices of the Supreme Court of the State of California indicates that there is and was a very close question as to whether the petitioner was accorded a fair trial in compliance with the Fourteenth Amendment to the United States Constitution.

It cannot be denied that petitioner was convicted on weak circumstantial evidence and in connection therewith a reconsideration of the prejudicial influences that were had upon the jury by virtue of the Trial Court's failure to adequately protect the rights of the petitioner, must certainly point to a deprivation of petitioner's rights without due process of law as accorded to him by the Fourteenth Amendment of the Constitution of the United States.

The materiality of the Trial Court's error in failing to grant a mistrial or new trial are fully shown in petitioner's brief supporting the petition for a writ of certiorari heretofore filed with this Court. The limitation imposed by the Trial Court on the examination of the prosecution's ex-

hibits by petitioner's expert impeded and hindered the defense of the case in which petitioner was convicted on extremely weak circumstantial evidence.

CONCLUSION

Petitioner, therefore, respectfully urges the granting of a re-hearing, the vacating of the order denying certiorari, and, upon such re-hearing, the granting to the petitioner of a writ of certiorari directed to the Superior Court of Los Angeles County, State of California.

Respectfully submitted,

IRVING I. ERDHEIM,
Attorney for Petitioner.

I, IRVING I. ERDHEIM, attorney for the petitioner above named, do hereby state and certify, pursuant to Rule 33 of the Revised Rules of the Supreme Court of the United States, that the foregoing petition for re-hearing is presented in good faith and not for any purpose of delay, and I further certify that the said petition is restricted to the grounds specified in said Rule 33 as amended.

IRVING I. ERDHEIM,
Attorney for Petitioner.

January 2, 1953.